No. 14115

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBERTS BROTHERS,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT, ROBERTS BROTHERS

ROSENBERG, SWIRE & COAN,

ABE EUGENE ROSENBERG,
PHILIP A. LEVIN,

Of Counsel,
Respondent, Roberts Bros.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-54

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STATEMENT OF THE CASE

This is a petition by the National Labor Relations Board for enforcement of an order against Respondent. The jursdiction of the Court is conceded. The facts are stipulated.

In brief, the employer, after the union had claimed that it represented a majority, made a speech to the employees opposing the union. The speech contained neither promise of benefit nor threat of reprisal. Then

Respondent took a secret poll of the employees for its information in determining whether the union in fact represented a majority.

The Board concluded that the above-stated facts constituted coercion and violated Section 8 (a) (1) of the National Labor Relations Act, as amended. Respondent contends that there is no substantial evidence to sustain the Board's finding and order.

ARGUMENT

In the absence of other unfair labor practices which give a coercive color to a secret poll of employees, there is no basis for assuming that the likely effect of the poll was coercive without any evidence, and a speech which the Act expressly permits the employer to make cannot of itself convert a non-coercive act into an unfair labor practice.

PETITIONER'S POINT A

The argument of the N.L.R.B. under this point is broken down into sub-sections. The first of these asserts that interrogation as to Union sympathy violates the Act because the employees may fear discrimination based on the information thereby obtained (Pet. Br., p. 5). The irrelevance of this contention to the record in this case, which stipulates that the poll was "secret", is so manifest as to require no discussion. Suffice it to say that an employer can not very well discriminate

against pro-union employees because of a poll which does not reveal who they are.

The Board then argues that even though the poll may in fact be secret, employees may fear that the employer has used some illegitimate means of determining how individuals voted (Pet. Br., p. 6). No justification for this assumption exists in the record. The question before the Court is not whether some hypothetical employee might have been coerced, but whether or not these employees, under the stipulated facts, have in fact been coerced or restrained. If the union or the Board had any evidence that Respondent did use some undisclosed method to determine how individuals voted, or even that any employee was afraid that it had done so, they were at liberty to present such evidence. Instead, it was expressly stipulated by the parties that the poll was secret (Stip., Paragraph X, R., p. 11),* and the only point relied upon by petitioner is that a "secret poll" violated the Act (R., p. 39). Had the secrecy of the poll been at issue before the Board, the Respondent could have presented testimony that its secrecy was scrupulously respected and that the employees were not afraid that their votes might be revealed. There was no need for such testimony because it was admitted and stipulated throughout that the vote was secret.

In this connection, the Board contends that the test is not whether an employee was actually intimidated, but whether the employer's conduct may be reasonably said to interfere with the rights of employees. This,

*References to the Transcript of Record are designated "R".

however, does not dispense with the need to present evidence. The mere statement of counsel that employees might fear reprisals is insufficient. Employees *might* fear reprisals as a result of any conduct of the employer, whether violative of the Act or not. Evidence must be presented from which the Court can reasonably infer that the employees have in fact been coerced. In the cases cited by the Board (Footnote 5, Pet. Br., p. 6), such evidence was presented.

For instance, in the case of *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732 (C.A.D.C., 1950), cert. den. 341 U.S. 914, there was interrogation of individual employees, a promise of benefits, which is specifically proscribed by the Act, a threat to close down the mill, which is specifically proscribed by the Act, and a refusal to bargain with a union actually having a majority. It is significant that in discussing the scope of judicial review under the amended Act, the Court said:

> "What the amendment was intended to do was insure that in the fringe or borderline case, where the evidence affords but a tenuous foundation for the Board's findings, the Court of Appeals would scrutinize the entire record with care and be at liberty, where there is not 'substantial evidence' to modify or set aside the Board's findings." 185 F. 2d 732, 738.

In *N.L.R.B. v. Link-Belt Co.*, 311 U.S. 584 (1941), the Board is presumably relying upon the following language:

> "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally,

> the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." 311 U.S. 584, 588.

Facts, however, must be presented from which the inference could be drawn. In that case, the Court stated that "the whole congeries of facts before the Board supports its findings". There was evidence that the employer engaged in industrial espionage, maintained and, through its supervisory employees, promoted a company union, and that employees were discriminatorily discharged for union activities. This is substantial evidence from which inferences of a violation of the Act can reasonably be drawn.

In *Elastic Stop Nut Corp. v. N.L.R.B.,* 142 F. 2d 371 (C.A. 8, 1944), cert. den., 323 U.S. 722, which arose before the "free speech" amendment to the Act, the Board presumably relies upon the statement:

> "Where the conduct was coercive, as found here, it is not necessary to show that the coercive conduct had its desired or intended effect." 142 F. 2d 371, 377.

This, of course, does not free the Board from the necessity of showing that the conduct was coercive, or could reasonably be inferred to be so. Furthermore, that was a case in which rival unions were contending for the right to represent the employees and the em-

ployer was acting in favor of one of them. The Court said:

> "Under the statute it was the duty of petitioner to refrain from intrusion or interference since the question of choosing an organization for the purpose of collective bargaining was the exclusive concern and business of the employees." 142 F. 2d 371, 376.

Here, however, under the amended Act, the question of whether the employees are to have a union or not is not solely their concern. The employer is specifically given the right to express his "views, argument, or opinion" by Section 8 (c).

The issue is, therefor, whether there is any evidence before the Board of a violation of Section 8 (a) (1). Counsel's supposition that some hypothetical employee may have feared that his vote might have been disclosed would not be evidence under any state of facts; when it is expressly stipulated that the poll was in fact secret, such argument is thoroughly illegitimate.

The next argument is that the poll "conveyed . . . the 'fear of retaliation against the employees as a group should they oppose the desires of the employer'." (Pet. Br., p. 7). The point of this proposition is not entirely clear. It is admitted by Respondent that it made a speech to employees opposing the union, and it is admitted by the Petitioner that the speech was privileged under Section 8 (c); i.e., that it contained neither a promise of benefit nor a threat of reprisal. In what way the poll constituted a threat of reprisal that the speech did not is not explained by Petitioner, except that em-

ployees as a group may always fear some retaliation by the employer for preferring a union when the employer has expressed opposition to unionization. The Act, however, expressly gives the employer this privilege, so long as it is not abused by the making of threats. The Board somehow purports to find a threat in the taking of a secret poll, but it fails to explain why. There is no more reason for employees to expect retaliation for organizing a union when the employer makes an anti-union speech and then takes a poll, than when he merely makes the speech.

Moreover, the Respondent's speech specifically explained to the employees, not only that it would not retaliate against them if they organized, but that it could not legally do so (R., pp. 15-16, 18-19). The Petioner is once again hypothesizing about some supposititious employee who may be led to believe by the taking of a poll that his vote for a union might lead to economic sanctions, even through no threat of economic sanction was made. There is no evidence that any such timorous employee existed, or that he would not have been equally fearful because of the privileged speech in the absence of a poll. In fact, there is nothing charged here that would not be equally true in the absence of a poll. For support of the contention that the poll itself tended to coerce employees, we have the bare assertion of counsel, unsupported by proof.

The Board then argues that the last minute character of the speech, immediately preceding a poll controlled by Respondent, impeded and coerced the employees' choice, even though the speech itself was legal

(Pet. Br., p. 7). The argument would carry more weight were this election in any way binding upon the employees and not merely for the information of Roberts Brothers in determining the truth of the union's claim that it represented a majority of its employees. The Board cites *N.L.R.B. v. Syracuse Color Press, Inc.,* No. 99 (C.A. 2), decided Jan. 5, 1954, 33 L.R.R.M. 2334, to the effect that the step from interference to restraint is short (Pet. Br., p. 8). In context, that quotation reads:

> "Here the time, the place, the personnel involved, the information sought, and the employer's conceded preference, all must be considered in determining whether or not the actual or likely effect of the interrogations upon the employees constitutes interference, restraint or coercion. This effect is not always easy to discern, but here we have definite proof that the question as to membership propounded by respondent to two employees prompted at least one of them to reply untruthfully. He gave as his reason for the untruth, 'I would be put on the spot'. He also stated, 'I told him no, for the simple reason if I told him yes, I was afraid I might get the rest of the fellows . . .' Here is actual proof that the interrogation did, in fact, implant a fear that a truthful answer would be a matter of embarrassment either with fellow employees or with the management, or both. The step from embarrassment to restraint or intimidation is a short one." 33 L.R.R.M. 2334, 2336.

The difference between the *Syracuse* case and the present one is that in the former, the Board presented "actual proof" to support its contentions. Evidently the Board considers this an immaterial distinction; Respondent submits that this Court should not so lightly dismiss the difference.

Aside from that aspect, the *Syracuse* case, which is cited no less than five times by the Board (Pet. Br., pp. 6, 8, 9, 13), involved oral interrogations of individual employees which, of course, can constitute a basis for discrimination. Other than the speculations of counsel that this poll was not what all parties have stipulated it to be, there is no reasonable basis for inferring even a possibility of discrimination in the present case.

PETITIONER'S POINT B

Petitioner next argues that the poll, in effect, resolved the question of representation. Before going on to the merits of this contention, Respondent wishes to point out that this issue is not before the Court. The question of whether or not a poll by the employer of his employees wrongfully ousts the N.L.R.B of its jurisdiction, or unlawfully usurps the functions of a federal agency, may be a proper question for determination by a Court upon an appropriate record. Respondent will argue hereafter that it does not do so. But the Court will search in vain through the charge (R. p. 3), the complaint which superseded it (R., p. 6), and Petitioner's Statement of Points to be Relied Upon (R., p. 39), for any indications that this matter is at issue in the present case. The only question before the Court is whether Roberts Brothers interfered with, restrained or coerced its employees in their right of self organization. Insofar as the contention that the poll is coercive is concerned, that question is discussed under Section A of Petitioner's Brief. Petitioner recognizes this when it

begins its argument under Section B: "In addition to the coercive impact just described . . ." (Pet. Br., p. 9). Respondent contends that this question is not before the Court and should not be considered.

On the merits, the simple answer to Petitioner's assertion that this vote was an employer resolution of the question of representation is, that it simply is not so. The poll was solely for the information of Respondent. It had no binding effect of any kind and resolved nothing. The employees were probably aware of this to begin with, but there is no need to speculate because the record shows that they were so advised (R., pp. 20-21). Consequently, this was not an employer resolution of the question of representation, but merely, as the employees were told, "a secret ballot for our information."

The Board argues that this forces a union to a show of strength "at a stage of organization when employees have not had a full opportunity to persuade their fellow employees . . ." (Pet. Br., p. 10). In so doing it ignores the fact that this vote was precipitated by the union claim of majority representation and its demand that Roberts Brothers make no changes in the status of its employees pending further negotiations (R., pp. 11, 14).

If the union had not had a full opportunity to proceed, it should have refrained from making exaggerated claims. It is significant in this case that the union's charge contains an allegation that Respondent refused to bargain (R., p. 14), but that this could not even stand up under the investigation preliminary to issuing a complaint and, therefore, was not included in it (R.,

pp. 7-8). This evidences the Board's view at the time of the invalidity of the union's claim to majority status. In short, then, if the union felt it was not ready for an election, it should not have claimed that it had a majority. Having claimed one, it is hardly in a position to complain about the timing of the poll.

In any case, as petitioner recognizes, the Act no longer leaves even the time of official determination of majority status exclusively within the control of the union. The employer can petition for a representation election at any time after the union claims recognition (Section 9 (c) (1) (B)). This indicates that Congress does not consider it essential that the union have an unlimited time "to discuss with and inform the employees concerning matters involved in their choice," or even that the union, having once claimed a majority, need have any say on the subject of timing. In the present case, nothing was done until the union actually had made a claim that it represented a majority.

The Board also contends that the unfavorable results "provide the employer with an apparent basis for refusing to recognize a union when the union in fact represents a majority of the employees," and that this, therefore, tends to discourage further organizational efforts (Pet. Br., pp. 10-11). Once again, we find ourselves far beyond the limits of the record in this case. Not only was there no finding by the Board that the union had a majority, but the Board refused even to include the union's charge of refusal to bargain in its complaint. Had the union had a majority, which it did not, it is

mere guesswork to say that any employee who belonged to the union would vote against it in a secret ballot. Once again, the Board piles speculation upon conjecture to construct the tottering edifice to which it points as "evidence" of a violation of the Act.

Petitioner also contends that other methods were available to the employer to determine how his employees felt about the union and that where there is no compelling business reason, a vote should not be taken under conditions exclusively controlled by the employer (Pet. Br., p. 12). As for the lack of business reason, there is no evidence either way, but Respondent submits that the union's demand that it make no changes in the status of employees under the union's jurisdiction was ample reason. Otherwise, the employer might have to postpone or forego changes in wages and hours, grievance procedures, promotions, hiring and firing, and the multitude of other issues that fall within the scope of labor-management relations until a Board-ordered election could be held. This could take months. (See footnote 7, Pet. Br., p. 10.)

On the other hand, if Respondent did nothing, it was faced with a possibility that the Board might thereafter certify the union without an election on the ground that it did not have a bona fide doubt of the union's majority status. See, e.g., *N.L.R.B.v. Ken Rose Motors,* 193 F. 2d 769 (C.A. 1, 1952); *N.L.R.B v. Crown Can Co.,* 138 F. 2d 263 (C.A. 8, 1943). The Board suggests as an alternative a check of membership cards (Pet. Br., p. 12), but, after all, the Act gives the employer, as well as the

union, the right to express his views on unionization and the right to an impartial Board election. The number of individuals that the union has signed up by personal solicitation without the employer having an opportunity to express his views does not necessarily represent the number who will vote for the union in a Board-conducted election after due deliberation. In this regard, it is interesting that after charging that the poll herein was illegal because it was an employer resolution of the question of representation, the Board suggests a union resolution of the question as a legal alternative. Neither can or should be binding, in the absence of consent by the other party.

The purpose of this poll was for Respondent's information in conducting itself with respect to the union's claim. The results justified it in refusing to recognize that claim, subject, of course, to a Board election. Had the vote favored the union, Respondent might have recognized the union or petitioned for a Board-conducted election. But is it reasonable to require an employer to suspend its personnel practices until a Board-conducted election can be held, whenever a union makes an unfounded claim to a majority? Cannot an employer make for himself a preliminary determination whether there is a basis for a claim, and conduct himself accordingly? We must not lose sight of the fact that during an organizational campaign, or pending an N.L.R.B. election, an employer runs great risks if he discharges employees, or make changes in wages, hours, or working conditions. (See, e.g., *N.L.R.B. v. Electric City Dyeing Co.*, 178 F.

2d 980 (C.A. 3, 1950); *Atlanta Metallic Casket Co.*, 91 N.L.R.B. 1225, (1950).) This may be so even though the employee deserved discharge (*N.L.R.B. v. Electric City Dyeing Co.*, supra), or the benefits had been long planned. (*Minnesota Mining & Mfg. Co.*, 81 N.L.R.B 557 (1949).) Why should the employer be required to postpone such actions until the relatively ponderous machinery for a Board election goes into action, when there is in fact no basis for the union's claim?

But, over and above this, there is no showing whatever of unfairness, restraint or coercion in the manner of taking the poll. True, it was taken at the request of Respondent, for Respondent's information. But, beyond the fact that the poll was under the control of management, the only evidence is that it was a secret ballot. If the Board or the union had evidence that it was unfairly conducted they could and should have presented such evidence. Other than its bare assertion, the Board makes no showing that there was anything coercive in the manner of taking of a vote. The argument is completely circular; it states that this poll is coercive because polls are coercive, and polls are coercive because somebody might be coerced by them. The symmetry of the circle is unbroken by any evidence of coercion.

The difficulties in this case, including the fact that the Board has found it necessary to go outside the record so often may be traced to one of the pitfalls of the adminstrative process—the fact that the Board is confusing its rule-making and adjudicatory powers. It is completely in order for the Board, in laying down regulations

for the conduct of representation elections, to rule that speeches within the twenty-four hour period before the election shall henceforth be prohibited, because the Board thinks they are likely to have a coercive effect. This is proper rule-making and as the Board said, was instituted "pursuant to our statutory authority and obligation to conduct elections in circumstances and under conditions which will insure employees a free and untrammelled choice." *Peerless Plywood Company,* 107 N.L.R.B. No. 106, December 22, 1953.

The Board has power to make rules for the conduct of elections, but the statute prescribes what constitutes an unfair labor practice, and when a specific case comes up in which the Board must decide whether an unfair labor practice has been committed, it is exercising its adjudicatory function. Therefore, it is under the duty of finding facts to meet the statutory standard in the particular case. It cannot lay down a broad general rule and assume that corecion exists each and every time a poll is taken—the obligation placed upon it is to determine whether coercion did take place in the case before it.

In this type of situation the Board is acting in a quasi-judicial capacity, and as such is under much the same restrictions as a Court. A Court, for instance, can denominate certain acts indicia of fraud, but it cannot lay down a broad rule that wherever those facts appear there is fraud. The duty of the finder of fact is, ultimately, to find whether fraud existed, not whether the indicia existed. And so, in this case, the Board must at

least find that the circumstances here were such as could reasonably be inferred to be coercive in this precise situation.

Respondent submits that the stipulated facts are insufficient to support such a finding. As this Court has stated, "coerce," "restrain" and "interfere" are "strong words," not too lightly to be inferred. *Wayside Press v. N.L.R.B.*, 206 F. 2d 862 (C.A. 9, 1953.)

For the foregoing reasons, as the Second Circuit said in the *Syracuse* case, supra:

> "Judicial precedents are helpful but not conclusive. Of necessity, interference, restraint or coercion depend upon *the facts and circumstances of each individual case,* so that the inquiry here is directed to the evidentiary basis for the Board's order *in this particular case.*" (Emphasis supplied)

PETITIONER'S POINT C

Under this heading, the Board discusses a few of the cases cited by Respondent before it, and attempts to distinguish them. Before going into the questions herein raised, Respondent desires to discuss the cases cited earlier by the Board (Footnote 6, Pet. Br., p. 9), as judicial precedent for the coercive effect of employer-conducted elections. For convenience, they will be discussed in the order cited by the Board.

In the case of *N.L.R.B. v. Sunshine Mining Company,* 110 F. 2d 780 (C.A. 9, 1940) which took place before the "free speech" amendment was enacted, the poll was taken in an atmosphere of general labor unrest, strike agitation and opposition of the employer to the

union by having foremen circulate an anti-union petition. A company-dominated union was formed. Furthermore, the ballot itself was "skillfully worded so as to suggest adverse criticism of the Union," p. 786. This case is distinguishable not only on the facts, but on the law, which at that time did not permit an employer to attempt to influence his employees' choice.

The next four cases all involve company unions, and all were prior to the "free speech" amendment. The employer was then under a duty to be neutral between unions, and in each of these cases he indicated his support of the company union prior to or during the poll. Each of them is not only distinguishable, but totally irrelevant, and they are discussed only briefly.

In *N.L.R.B. v. Tehel Bottling Company,* 129 F. 2d 250 (C.A. 8, 1942), the employer suggested the formation of the company union, contributed to it and allowed it to hold meetings on company premises. The poll involved was taken at one of such meetings. The Court held that the entire record supported the contention of the Board that the employer unlawfully displayed his preference for the company union.

In *N.L.R.B. v. Colten,* 105 F. 2d 179 (C.A. 6, 1939), not only did the employer express an unlawful preference, but the Court stated at page 182 that "[t]here is substantial evidence that the vote was neither secret nor uninfluenced," and further that "[t]here was evidence that the manner in which the vote was taken engendered fear among the employees of unfortunate consequences

if it resulted unfavorably to the management." Furthermore, there is evidence that workers were warned that they would lose their jobs and that Respondent threatened to go out of bsuiness. The order enforced in that case provided, inter alia, that Respondent cease and desist from discouraging membership in the union. Such an order would be wholly illegitimate under the present Act.

In *N.L.R.B. v. Burry Biscuit Corp.,* 123 F. 2d 540 (C.A. 7, 1941), the employer suggested an attorney for the company union, allowed it to hold meetings on the company's time, which the supervisors urged employees to attend, and took a poll at one of such meetings without the competing union being on the ballot. The Court, while stating that this was a "border-line" case (p. 543) held that this constituted a showing of preference for the company union and violated the employer's duty to be neutral.

In *Titan Metal Mfg. Co. v. N.L.R.B.,* 106 F. 2d 254 (C.A. 3, 1939), cert. den., 308 U.S. 615, the Court indicated that "neutrality is the touchstone" (p. 257) to be used in deciding company union cases. The Court found that neutrality had been violated by threats to close the plant or move it if the union came in, and by a ballot which proclaimed on its face that it was "official," but contained information favorable to the company union.

In the case of *N.L.R.B. v. Sommerville Buick,* 194 F. 2d 56 (C.A. 1, 1952), which is the only case cited to be decided after the 1947 amendment, there are several clearly distinguishing factors. The speech made by the employer prior to the poll was not privileged, but con-

tained an unlawful threat to close his plant. The company president individually interrogated employees prior to the poll. And, most coercive of all, three leaders of the union were discriminatorily discharged the day before the poll was taken. Under these circumstances, the entire record as a whole showed violations of the Act. The case certainly cannot support the proposition for which it is cited, that a poll in and of itself is coercion.

Under Section C, part 1 of its Brief, Petitioner argues that since the evidence shows an unfair labor practice, the absence of other unfair labor practices should not affect the decision. Respondent has no quarrel with the principle that "the Act prohibits *any* interference, restraint or coercion," enunciated by Petitioner (Pet. Br., p. 13). Respondent's argument was that a poll, without more, does not constitute an unfair labor practice, and that no inference of coercion is permissible from a poll alone, or together with a legal speech, in the absence of threats, or other attendant conduct which makes it a reasonable inference that a poll may have helped to produce a coercive effect. Cf. *Sax v. N.L.R.B.,* 171 F. 2d 769 (C.A. 7, 1948); *N.L.R.B. v. England Bros., Inc.,* 201 F. 2d 395 (C.A. 1, 1953).

Under part 2, Petitioner argues that the poll, standing alone, is coercive, and that it does not gain any immunity because the speech preceding it is legal (Pet. Br., p. 13). The force of this argument is completely vitiated by the decision in *Howard W. Davis d/b/a The Walmac Company,* 106 N.L.R.B. No. 244, decided October 29, 1953, 33 L.R.R.M 1019 (Footnote 9, Pet. Br., p. 14),

wherein the Board held that a poll standing alone, was not an unfair labor practice. If a poll is coercive, regardless of the circumstances, *Walmac* was incorrectly decided. Obviously, from that decision, the Board itself does not take so broad a view of the evils of polling as it is here asserting. Apparently, Petitioner's position boils down to this: by making a legal speech, Roberts Brothers rendered an otherwise non-coercive act coercive. If the speech had not been made the *Walmac* decision would have controlled.

Respondent submits that the policy of the Act is to permit the employer to express his views freely. It would violate this policy and defeat the Congressional intent to allow the Board to rule that an otherwise legal speech can convert a non-coercive action into a coercive one. In effect, the Board argues that a speech containing no threat of reprisal or promise of benefit may nontheless be illegal because of its proximity to otherwise legitimate conduct. The Act makes no such exception.

With respect to part 3 (Pet. Br., p. 13), Respondent admits that it can cite no case precisely in point; nor has Petitioner done so. But Respondent can cite cases which are, on their facts, considerably closer to the present case than any cited by the Board.

In the case of *Wayside Press v. N.L.R.B.*, 206 F. 2d 862 (C.A. 9, 1953), this Court considered the effect of a question on the employer's application blank concerning the applicant's union affiliation. Certainly such "mass interrogation," to use the Board's phrase, would be far more likely to instill a fear of discrimination than a

secret ballot, since each employee must reveal his individual position. Furthermore, opposition to the union might very well be implied in such a situation even though not expressed by the employer. What other reason might he have for inquiring about the union status of job applicants? Still, this Court held that in the absence of overt hostility to the union and without evidence of actual discrimination, such interrogation was not an unfair labor practice. Respondent feels that the employer's conduct in that case was far more likely to be coercive than in the present case.

N.L.R.B. v. Kingston, 172 F. 2d 771 (C.A. 6, 1949), it is true, did not involve hostility to the union, but if it does nothing else, it certainly refutes the Board's contention that a poll standing alone is coercive. This leaves the Board in the uncomfortable position of arguing that although Respondent's speech was expressly permitted by the Act, there would have been no unfair labor practice without it. Such a rule cannot be reconciled with the policy of the amended Act to permit employers freely to express their views in a legitimate manner.

In *N.L.R.B. v. Montgomery Ward & Co.,* 192 F. 2d 160 (C.A. 2, 1951), the facts showed that there was opposition to the union expressed, and inquiries made by the management of individual employees. Although approving the Board's finding that an employee had been discriminatorily discharged, the Court went on to say, "but inquiries concerning what was being done in behalf of the union, and statements as to his not liking the union, to the extent that they constitute no threat of in-

timidation, or promise of favor or benefit in return for resistance to the union, were not unlawful, particularly after the 1947 amendment of the Act found in Section 8 (c), 29 U.S.C.A. Section 158 (c)."

Although this case may be dismissed by the Board as one of isolated cases of interrogation (Pet. Br., p. 5), Respondent submits that even isolated instances of personal questioning of individual employees are more likely to have a coercive affect than a secret poll of the entire working force. The former, at least, afford a basis for possible discrimination. Respondent believes that the *Montgomery Ward* case goes further on its facts than the present one, since it involves hostility to unions, plus individual interrogation.

In *N.L.R.B. v. England Bros., Inc.*, 201 F. 2d 395 (C.A. 1, 1953), the supervisors were told to advise the employees that the company was "opposed to having a union in our store because we felt we would prefer to deal directly with our employees, rather than with them through any outside organization." After this hostile attitude had been expressed, supervisory employees interrogated individual members of the working force concerning the union. The Court denied the Board's petition for enforcement, holding that in the absence of "an *illegal* anti-union attitude or background," (emphasis supplied) the Board could not rely upon an "aroma of coercion" as in *Joy Silk Mills v. N.L.R.B.*, supra, but must show something coercive. This is precisely what Respondent argued before the Board. (See Petitioner's Brief, Section C, Part 1, p. 12.)

Furthermore, the Court quoted with approval from *Sax v. N.L.R.B.*, 171 F. 2d 769, 773 (C.A. 7, 1948), the following language:

> "No case has been cited and we know of none holding the view asserted by the Board here. The cases cited by the Board all involve a course of conduct of which the interrogatories as to membership and activity of a union were only a part of the whole picture. In none of them did the mere words of inquiry stand alone."

The Board has here attempted to argue that the words of inquiry did not stand alone, but all it has been able to point to is an admittedly legal speech. This factor also existed in the *England Bros.* case, and the Court properly refused to take it into consideration. To do otherwise would be to predicate an unfair labor practice upon conduct which the Act specifically and expressly authorizes.

Respondent contends that this case, too, goes beyond the facts of the present case, because it involved overt hostility to the union, plus individual interrogation rather than a secret poll.

CONCLUSION

Interrogation or polling of employees, either individually or as a group, is not an unfair labor practice in the absence of other conduct rendering the interrogation or poll coercive. *Sax v. N.L.R.B., N.L.R.B. v. England Bros., Inc., Wayside Press v. N.L.R.B., N.L.R.B. v. Kingston, Howard W. Davis, d/b/a The Walmac Company,* all supra.

The only other conduct involved in this case is a speech which the Act expressly permitted the employer to make. It would be carving a wholly unwarranted exception out of Section 8 (c) to say that a legal speech, while not itself a violation of the Act, can render otherwise lawful conduct unlawful. There is no substantial evidence to support the Board's Findings and Order, and the petition for enforcement should be denied.

Respectfully submitted,

ROSENBERG, SWIRE & COAN,

ABE EUGENE ROSENBERG,
PHILIP A. LEVIN,

Of Counsel,
Respondent, Roberts Bros.

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